IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 743 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HARGOVIND TEJABHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 743 of 1991

MR KJ SHETHNA for Petitioner No. 1

MS HANSA PUNANI, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/02/2003

ORAL JUDGEMENT

This is an appeal under Sub-section 2 of Section 374 of the Code of Criminal Procedure, 1973 (for short,

"the Code"), challenging the judgment and conviction order dated 18/09/91 recorded by the learned Special Judge, Panchmahals at Godhra in Special Case No. 3 of 1987 under which the learned Special Judge convicted the present appellant for an offence punishable under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act. The learned Judge directed the present appellant to suffer RI for one year. The appellant was directed to pay fine of Rupees One Thousand and in default of payment of fine, the appellant was required to suffer further RI for three months.

2. The learned Judge also convicted the appellant for an offence punishable under Section 161, IPC but, did not impose separate sentence for the said offence.

3. The facts of the case by the prosecution before the trial court, as can be gathered from the records and proceedings, may be briefly stated as follows.

The appellant was serving as a Medical Officer in the Government Dispensary at Baria in Panchmahals District. On 06/03/86 at evening hours, one Dalubhai Kalubhai had some quarrel with his brother Zavrabhai Kalubhai. In the process, Zavrabhai Kalubhai sustained injuries. Therefore, an FIR was filed before the concerned police station. The patient was examined by the present appellant - being a Medical Officer and demanded an amount of Rupees Forty from the said patient for the said examination and treatment. As per the case of the prosecution, the said amount was paid to the appellant.

4. Thereafter, no further treatment was given to the patient upto 08/03/86 and therefore, Shankerbhai Zavrabhai, the son of the injured patient, approached the present appellant with respect to the further treatment of his father, Zavrabhai. At that time, the present appellant demanded a bribe of Rupees Fifty. That amount was also paid with an instruction that the son of the patient would not disclose the said fact to anyone else.

5. The injured had still pain in his hand and therefore, he complained about the same to the appellant. At that time, the appellant demanded a bribe of Rupees Two hundred from the complainant, the son of the patient, for better treatment. Thereafter, the complainant filed FIR before the A.C.B Office which was reduced into writing. Then trap was arranged and ultimately as per the case of the prosecution, the appellant actually accepted the amount of Rupees Two Hundred as bribe from

Shankarbhai Zavarbhai in presence of panch no. 1. The said currency notes contained anthracene. When the currency notes were accepted, panch no. 1 went out of the chamber of the appellant and had given a signal to the raiding party at which the raiding party consisting of the Police Officer, other police personnel and panch no. 2 entered the room of the appellant. The said currency notes were seized. Panchnama was drawn. The appellant was arrested and at the close of the investigation chargesheet was filed for the aforesaid offence against the appellant.

6. After the appellant appeared before the trial court, police investigation papers were supplied to him. Charge was prepared and it was framed against the appellant. The appellant pleaded not guilty to the said charge. Therefore, the learned trial Judge proceeded to record evidence produced by the prosecution against the appellant. At the close of the evidence, further statement of the appellant under section 313 of the said Code was recorded. Arguments were heard and thereafter the learned trial Judge found that the prosecution had proved the aforesaid offence against the appellant. Therefore, the learned Judge heard the appellant on the point of quantum of punishment and thereafter, inflicted the aforesaid punishment on him by judgment and conviction order dated 18/09/91.

7. Feeling aggrieved by the said judgment and conviction order of the trial court, the appellant original accused has preferred this appeal before this Court. The appellant has contended before this Court that the material witnesses including the complainant and other witnesses have not supported the case of the prosecution and they have been treated hostile. It is also contended that the first panch had passed away before his evidence could be recorded. That, therefore, there was no evidence before the trial court with respect to the demand of bribe money and with regard to the acceptance thereof. That, therefore, the learned trial Judge has committed serious illegality in holding that the appellant had demanded and accepted an amount of Rupees Two Hundred as bribe, from the informant being the son of the said injured person.

8. That, even otherwise, the prosecution had failed to bring home, charge to the appellant and therefore, the learned trial Judge has committed error in convicting the appellant. That on the whole the judgment and conviction order of the trial court are illegal and erroneous and deserve to be set aside. It is therefore, prayed that

the present appeal be allowed, the judgment and conviction order of the trial court be set aside and the appellant be acquitted of the charge levelled against him.

9. On receiving the appeal, it was admitted and at the time of hearing, Mr K J Shethna has appeared for the appellant whereas Mrs. Hansa Punani, learned APP appeared on behalf of respondent - State. In fact, they have argued the matter at length. They have taken me through the evidence on record and through the reasonings and findings of the trial court during the course of judgment.

10. It is not much in dispute that in order to prove the case of the prosecution against the appellant, the prosecution has examined certain witnesses. At the outset, it may be stated that as per the case of the prosecution, the appellant had demanded and accepted the amount of bribe at three different occasions. At the first occasion, the amount was claimed on 7/3/86 in a sum of Rupees Forty. The second amount was thereafter demanded and accepted on 8/3/86. The third amount was demanded and accepted on 12/03/86. Out of the said three dealings, the first two dealings took place only in presence of the son of the injured. The third dealing took place, according to the case of the prosecution, in the presence of the informant - Shankarbhai Zavarbhai, the son of the injured, and panch no. 1, who wqs not alive at the time when the evidence was recorded. Therefore, we are required to consider as to whether the prosecution has proved that the appellant had demanded and accepted the amount of bribe on three different occasions.

11. In order to prove the said fact, the prosecution has examined Dr.Ravindrakumar Purohit at Ex.15. He was a Medical Officer serving at General Hospital, Devghad Baria. His evidence does not relate to the fact of demand and acceptance of bribe amount at the aforesaid three occasions.

12. The second witness examined by the prosecution is P.W. 2, Chitabhai alias Babubhai Narsinh, Ex.24. This witness was a Police Patel of Village Ughawada. On going through the evidence of this witness it is clear that his evidence does not lend any support to the prosecution but on the contrary he says that when the injured was examined, he was present there but there was no talk between the patient and the appellant. He was treated hostile by the prosecution and he was cross-examined by

the learned APP wherein nothing fruitful was derived.

13. The third witness, PW - 3, Motibhai Virsinghbhai, Ex. 25 has also turned hostile and he has been contradicted with his earlier statement recorded by the police.

14. Witness No. 4, Zavarbhai Kalubhai, Ex. 26 is an injured person. According to the prosecution, the appellant had demanded the amount of bribe on three occasions with a view to provide better treatment to this witness. This witness has turned hostel and he has stated that it had never happened that the appellant had demanded the amount of bribe and it was paid to him.

15. Witness No. 5, Shankarbhai Zavarbhai, Ex. 27, is the informant and the son of the earlier witness Jhaverbhai. He has also not supported the case of the prosecution. He has stated that his father was treated by the Doctor at the General Hospital, but, he does not say that the appellant was the concerned Doctor. The FIR lodged by him was read over to him, but, even thereafter he has not said anything in support of the said FIR. It is true that allegations have been made against the appellant in the said FIR, but, the FIR is a previous statement of the appellant and it could not be used as a substantive evidence. No doubt, it can be used to corroborate the testimony of the witness. But when the informant does not say anything about the demand and acceptance of bribe amount, as has been stated in the FIR the contends of the FIR thereof cannot be used as a substantive piece of evidence against the appellant. At the third occasion of acceptance of alleged amount of bribe of Rupees Two Hundred, the witness has deposed in Para 2 that he had gone to the room of the appellant in the company of police and panchas. Here also he has stated that he does not know the Doctor to whom he had gone. He has also stated that he had gone to him only once and hence, could not identify him. Therefore, the question of disputed identity of the appellant has arisen during the course of the evidence of this witness.

16. So far, the actual demand and acceptance of the bribe amount of Rupees Two Hundred is concerned, the witness has not stated that the appellant had demanded the bribe of Rupees Two Hundred even at that occasion also. It is to be noted that even prior to this date the appellant had never said during the course of his evidence that the appellant had demanded the amount of bribe of Rupees Two Hundred from him for rendering better treatment to his father.

17. In that view of the matter, so far the demand of bribe amount, on the date of trap is concerned, this witness does not at all support the case of the prosecution. Then with respect to the acceptance of the amount of bribe of Rupees Two Hundred on the date of trap, the witness has said that at the instance of the first panch, he tried to pay money to the Doctor at which the Doctor did not accept the same and questioned as to why he was paying the said amount. The witness has further said that the appellant did not accept the money and did not even handle it. The witness further says that the appellant got up and went away to examine other patients. This shows that even on the point of acceptance of bribe money on the date of trap, this witness has not supported the case of the prosecution to any extent.

18. The witness has deposed before the trial court that thereafter panch no. 1 told him that the vallate of the appellant was lying on the table and he may place the amount in the said vallate. Thereafter, the witness placed the said currency notes of Rupees Two Hundred in the vallate of the appellant lying on the table. This shows that even according to the evidence of this witness, the said amount of Rupees Two Hundred was placed in the vallate of the appellant without any demand by the appellant for the same. At the best, this could be treated to be a voluntary action on the part of the appellant.

19. So far, the subsequent events are concerned the appellant has stated that he had no idea as to whether further process of ultra violet lamp and anthracene powder were undertaken, after the police and other persons entered the room of the appellant.

20. This witness was treated hostile by the prosecution, but nothing fruitful could be derived from his cross-examination. In fact, by and large he has been confronted with his earlier statement made by him in the FIR as well as in his statement before the police. There also nothing fruitful has been derived from the said cross-examination and from the said contradiction of the witness.

21. The prosecution has thereafter examined PW-6, Ranjitsingh Balwanthsingh Baria, at Ex. 29. He is a co-panch and certain procedure was taken out in his presence also.

22. It has come on records during the course of his evidence that the witness was serving in the office of the District Panchayat at relevant point of time and he was called at the A.C.B. office by the PSI of the ACB Police Station. He has also deposed that the D.D.O. called him in his chamber and he was told not to come to office but to go to the office of the A.C.B. on the next morning. Therefore, he went to the office of the A.C.B. Thereafter, the experiment of anthracene powder and ultraviolet lamp was carried out in his presence. According to his evidence, the witness has further said that at the time of trap he was waiting outside the room of the appellant and as and when the first panch came out with a signal, he, along with the PI and other police personnel entered the room of the appellant and recovered the amount of Rupees Two Hundred in accordance with the panchnama.

23. It is, therefore, clear that he was not and could not be present at the time when the appellant allegedly demanded and accepted the amount of bribe of Rupees Two Hundred from the earlier witness, the informant. It is required to be seen that so far the first two demands and acceptances are concerned, he was not a evidence to the said event and therefore he could not say anything about the first two events of demand and acceptance of bribe said to have been demanded and accepted, since he was witness only to the trap and to the third incident of demand and acceptance of bribe.

24. The panchnama produced on record at Ex. 30 drawn at the spot in question, naturally says about the acceptance and demand of bribe money. At the same time it can reasonably be inferred that this aspect was drawn in the panchnama from the information derived from the first panch or from the informant. Here it is clear that the first panch is no more and the informant has not supported the case of the prosecution. Therefore, it cannot be said with certainty that the aforesaid aspects were actually brought in the panchanama at the instance of the said two witnesses. Moreover, when the said aspects have not been deposed in court by the aforesaid two persons, the said fact drawn in the panchnama cannot be said to have been proved by the prosecution. In other words, the prosecution cannot depend upon the statement of panch made in panchnama, Ex. 30 about the demand and acceptance of the bribe amount of Rupees Two Hundred, when the fact has not been deposed by any witness. In other words, this would not be treated to be an evidence and it cannot be read as an evidence against the appellant.

25. Again, therefore, it is clear that on the one hand, so far the demand and acceptance of bribe amount is concerned the informant has not supported the case of the prosecution. Panch no. 1 could not give evidence because he passed away before his evidence could be recorded. The statement of panch with respect to the demand and acceptance of bribe amount of Rupees Two Hundred mentioned in Panchnama, Ex. 30, cannot be treated as an evidence. Sameway, panch no. 2, whose evidence has been referred was also not a witness to the said event of demand and acceptance and therefore his evidence would not be useful for the prosecution for proving the demand and acceptance.

26. Then we can turn to the evidence of the Police Inspector. He was also not a witness to the said event inside the room. There is no dispute that he was not a witness to the said event. He has not given any evidence about the fact of demand and acceptance of the amount of bribe of Rupees Two Hundred. So far the earlier two occasions are concerned again he was not a witness to those events and therefore even with respect to the earlier two occasions of demand and acceptance of bribe amount also, his evidence is not found to be useful to the prosecution. In other words, the evidence of this witness is not found to be useful to the prosecution even with respect to the acceptance and demand of the three alleged dealings between the appellant and Shankarbhai.

27. The only evidence which now remains to be considered is the evidence of panch no. 2 and the I.O. with respect to the recovery of the amount of rupees Two Hundred from the said purse of the appellant.

28. Even, if we accept it for the sake of argument that the purse from which the currency notes of Rupees Two Hundred were recovered, was the purse belonging to the appellant, then also it has come in evidence that the said amount of Rupees Two Hundred was inserted in the said purse by the informant at the instance of panch no. 1. It is also a matter of evidence that this was done behind the back of the appellant as the appellant had already left the said place for examining other patients waiting for him.

29. Since the witness has not supported the case of the prosecution, we cannot depend upon the evidence of this witness. In that case it becomes a matter of doubt as to how the said currency notes came to be inserted in the vallate of the appellant. There is no evidence on

the said aspect. No one was present except the appellant - the informant and panch no. 1 at the relevant point of time. The informant does not say that the said notes were accepted by the appellant and were placed in the purse. He also does not say that at the instance of the appellant the said currency notes were placed in the vallate of the appellant. In any way, the evidence of Shankarbhai does not go to prove that the said amount was actually accepted by the appellant at any point of time. Therefore, even if the question of recovery is taken to have been proved then also it does not prove that the said amount was accepted by the appellant.

30. It is true that if the acceptance is proved, then the presumption may arise in favour of the prosecution that the said amount was accepted by way of illegal gratification. The prosecution has to prove that the accused had accepted an amount of bribe. In the present case, we find that so far, the recovery is concerned even if it is accepted that the amount was ultimately recovered from the vallate of the appellant, it does not lead us to further infer that the amount found from the said vallate of the appellant was an amount actually accepted by the appellant or that it was placed there in by Shankarbhai Zavrabhai or even by panch no. 1, at the instance of the appellant. In other words, the involvement of the appellant with respect to the said currency notes or the attachment of the appellant with respect to the said currency notes is not established on record. In other words, it is difficult to accept that the appellant had accepted the said amount.

31. In other words, I am of the opinion that the prosecution cannot be said to have proved beyond any reasonable doubt that the said amount was demanded and accepted by the appellant from Shankarbhai Zavrabhaai for better treatment to his father. It is, therefore, clear that the appellant would naturally be entitled to a benefit of reasonable doubt. At this stage, the learned APP had drawn my attention to the decision of State of Gujarat Vs. Tajbhai Karimbhai reported in 1999 (1) GLR, 831, wherein it has been observed that the demand of bribe money is not an essential ingredient of an offence

32. However, in a decision of the Hon'ble Apex Court rendered in Subash Parbat Sonvane Vs. State of Gujarat, reported in 2002 (2) GLH, 654, it has been observed that there was mere acceptance of money but there was no evidence of demand and therefore, the accused was ordered to be acquitted. In the present case, we find that so far the acceptance of bribe amount is concerned the

evidence is not complete. Hence, the evidence of demand and acceptance of bribe money through the evidence of recovery of muddamal currency notes becomes doubtful. In view of the above fact that the informant has not supported the case of the prosecution, the first panch has passed away and the second panch and I.O. were not witnesses to the said event of alleged demand and acceptance, I am of the view that when two ingredients have not been satisfactorily established and the third becomes a matter of reasonable doubt, it would not be proper for the Court to convict an accused person for a serious offence punishable under the said Act.

33. It is, therefore, clear that the prosecution cannot be said to have proved beyond any reasonable doubt that the present appellant had demanded and accepted the amount of bribe of different amounts, at three differed occasions, on three differed dates, as has been alleged against the appellant. The said fact has not been proved beyond any reasonable doubt and consequently the appellant becomes eligible for the benefit of doubt. It is, therefore required to be held that the trial court has not properly appreciated the aforesaid factual aspects, about the requirement of evidences and about the demand and acceptance of bribe money and the recovery thereof. It is more so, when the concerned witnesses have not supported the case of the prosecution and the witnesses who have supported the prosecution were not in a position to depose anything about the said three ingredients. The judgment and conviction order of the trial court are therefore not sustainable. The appeal is therefore required to be allowed and the judgment and conviction order of the trial court are rquired to be set aside.

34. For the foregoing reasons, this appeal is allowed, the judgment and conviction order recorded by the trial court are set aside and the appellant is ordered to be acquitted of the offence punishable under Section 161 IPC and under Section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act. The appellant is on bail. The bail bonds are cancelled. The amount of fine, if paid, be refunded to the appellant.

(D. P. Buch, J.)

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